(5)

Supreme Court, U.S.
FILED
NOV 2 - 1999
OFFICE OF THE CLERK

No. 98-1836

IN THE

Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

CHARLES W. CRAVEN
Counsel of Record
STEPHEN A. RYAN
MARION H. GRIFFIN
MARSHALL, DENNEHEY,
WARNER, COLEMAN & GOGGIN
Attorneys for Respondents
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2600

155431

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

3

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 15.8 of the rules of your Honorable Court, respondents wish to direct your Court's attention to a new decision which was not available at the time of filing of Respondents' Brief in Opposition.

On September 16, 1999, the United States Court of Appeals for the Third Circuit decided *Bauman v. U.S. Healthcare, Inc.*, __ F.3d __, Nos. 98-5222, 98-5262, 98-5263, 1999 U.S. App. Lexis 22464. Therein, the Third Circuit affirmed the district court's decision that three counts of plaintiffs' medical malpractice complaint were not completely pre-empted by § 502(a) of ERISA, 29 U.S.C. § 1132(a)(1)(b). Furthermore, the court reversed the lower court's decision that another count (Count Six) was completely pre-empted. Count Six alleged the defendant HMO was negligent because it did not provide for an in-home visit by a pediatric nurse. The Third Circuit remanded Count Six to district court, with instructions to remand it to state court, remarking "it is that court that will be in a position to decide the express pre-emption issue". 1999 U.S. App. Lexis 22464 at *34.

In beginning its analysis, the court noted that it was "revisit[ing] the issue of 'complete pre-emption' under the Employee Retirement Income Security Act . . . last considered in *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995)." *Id.* at *2. The Third Circuit regarded Count Six of the complaint as stating a claim concerning the adequacy of care, given that it was directed to the HMO as a medical provider. Repeating its reasoning in *Dukes*, the court held "Count Six sets forth an ordinary state law tort claim for medical malpractice." *Id.* at *32. The *Bauman* decision

reinforces the analysis and judgment of the Pennsylvania Supreme Court, in that ERISA does not preempt claims based upon an HMO's decision which merely seems to be a benefit determination, but the gravamen of which is really medical negligence.

The recently decided *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999) and *Danca v. Private Healthcare Systems, Inc.*, 185 F.3d 1 (1st Cir. 1999), neither support petitioner nor conflict with the Pennsylvania Supreme Court's decision in the instant matter. In both cases, the Circuit Courts of Appeals found the plaintiffs' claims came within the scope of § 502(a), and thus were completely pre-empted. The *Hull* decision does not discuss § 514(a). The *Danca* court merely reiterates that because those claims were completely pre-empted under § 502(a), they were also pre-empted by § 514(a). 1999 U.S. App. Lexis 18043 at *16.

The issue herein is the "relate to" language of § 514, not the civil enforcement provision of § 502. There is no conflict between the Pennsylvania Supreme Court and the *Hull* and *Danca* decisions. The ruling of the Pennsylvania Supreme Court does not touch on the complete-preemption exception of those state laws which fall within the civil enforcement provision of § 502. The court correctly addressed the "relate to" language of § 514 which is at issue here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES W. CRAVEN
Counsel of Record
STEPHEN A. RYAN
MARION H. GRIFFIN
MARSHALL, DENNEHEY,
WARNER, COLEMAN & GOGGIN
Attorneys for Respondents
1845 Walnut Street
Philadelphia, PA 19103
(215) 575-2600